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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/709,671	05/21/2004	John S. Smyth	BUR920040064US1	3670
45093	7590	03/05/2009		
HOFFMAN WARNICK LLC 75 STATE ST 14TH FLOOR ALBANY, NY 12207			EXAMINER RECEK, JASON D	
			ART UNIT 2442	PAPER NUMBER
			NOTIFICATION DATE 03/05/2009	DELIVERY MODE ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

btviplaw@us.ibm.com  
PTOCcommunications@hoffmanwarnick.com

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/709,671	SMYTH ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	JASON RECEK	2442	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 23 December 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-4, 6-8, 10-12, 14-19, 21-23, 25-27 and 29-31 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4, 6-8, 10-12, 14-19, 21-23, 25-27, 29-31 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

This is in response to the RCE filed on December 23rd 2008.

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/23/08 has been entered.

### ***Status of Claims***

Claims 5, 13, 20 and 28 have been cancelled per applicant's request.

Claims 1-4, 6-8, 10-12, 14-19, 21-23, 25-27 and 29-31 are pending but currently rejected under 35 U.S.C. 103(a).

Claims 1-4, 6-7, 23, 25-27, and 29-30 are currently rejected under 35 U.S.C. 101.

***Response to Arguments***

2. Applicant's arguments have been fully considered and are persuasive. Specifically, the new limitations of the independent claims are not entirely disclosed by the cited art. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of Asano et al. US 2003/0208599 A1.

***Claim Rejections - 35 USC § 101***

3. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims s 1-4, 6-7, 23, 25-27, and 29-30 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

Regarding claim 1, it is a method or process claim and thus must meet the machine or transformation test as set forth by *Bilski*. The claim recites a "network resource" however in light of the specification (paragraph 18) a network resource is not a particular machine or apparatus. The claim also recites a step of calculating however this is merely data gathering and does not transform a particular article into a different state or thing.

Regarding claims 2-4 and 6-7 they do not recite any limitations that would render the subject matter patentable such as a particular machine or transformation.

Regarding claims 23, 25-27 and 29-30, they correspond to claims 1-4 and 6-7, thus they are directed to non-statutory subject matter for similar reasons.

***Claim Rejections - 35 USC § 103***

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1-4, 6-8, 10-12, 14-19, 21-23, 25-27 and 29-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Eden US 2002/0184361 A1 in view of Peterson et al. US 2004/0010584 A1 and further in view of Asano et al. US 2003/0208599 A1.

Regarding claim 1, Eden discloses "querying the network resources to determine network resource availability" as querying network devices (paragraph 10, Fig. 13), "setting a status indicator" as changing a GUI (paragraph 12, Fig. 13), "in the case that the status indicator indicates that the network resources is available ..." as making a determination as to which devices are available (paragraph 10), and "setting the status indicator to indicate the network resource is available only if a time of the query is less than a specified response time" as having a timeout value, thus the resource cannot be available unless the query time is less than the timeout value (paragraph 33).

Eden does not explicitly disclose "determining whether a query of the network resource to determine network resource availability and response time is occurring" however this is taught by Peterson as a dampening window whereby the result will not be indicated while the query is occurring (paragraphs 12-13). This dampening window determines whether a query is occurring (Fig. 2 paragraph 47). Peterson teaches querying for errors (availability) and performance (response time), see paragraph 11. Peterson does not by itself teach to perform this determination only when a status indicator indicates the network resources are available however Eden teaches indicating when resources are available.

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify Eden by including the dampening window taught by Peterson for the purpose of ensuring no test (query) is presently occurring. The motivation for doing so is to allow the query to complete before returning results (Peterson paragraph 35).

Eden and Peterson do not specifically disclose "the specified response time is calculated based on ... the average query completion time determined using the response time" and "dynamically updating" however this is taught by Asano has measuring response time, calculating the average and updating (paragraph 49, Fig. 5).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify Eden and Peterson with the teachings of Asano for the purpose of

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updating the response time. By having the most recent data, the system will be able to give more accurate results.

Regarding claim 2, Eden discloses "indicating that the network resources is available" as changing status to available (paragraph 59).

Regarding claim 3, Eden discloses "repeating querying the network resource" as querying again (paragraph 35).

Regarding claim 4, Eden does not explicitly disclose "a querying indicator that indicates whether querying is occurring" however it would be inherent that the system knows whether a query is occurring, once started, the system waits for a response or timeout (Fig. 13), until one of these events occurs the system knows whether it is querying. It would have been obvious to one of ordinary skill in the art at the time of the invention to add an indicator for the purpose of more easily ascertaining when the system is querying. Status indicators are well known in the art.

Regarding claim 6, Eden does not explicitly disclose "the specified response time is equal to a value within a threshold" however this is taught by Peterson as a using a threshold to determine whether a test was performed in time (paragraph 90). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify

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Eden by using a threshold as taught by Peterson for the purpose of ensuring good data. The motivation for doing so is to eliminate bad data that would skew the average.

Regarding claim 7, Eden discloses “setting the status indicator to unavailable” as representing a device as unavailable (paragraph 36).

Regarding claim 8, Eden discloses “a query computer ... and a status computer” as a computer system that queries and represents the status of network devices (paragraph 29).

Regarding claims 10-12 and 14-15, they are system claims that correspond to the method of claims 1-4 and 6-7, therefore they are rejected for the same reasons.

Regarding claims 16-29 and 21-22, they are computer medium claims that correspond to the method of claims 1-4 and 6-7, therefore they are rejected for the same reasons.

Regarding claim 23, it is a method claim that correspond to the system of claim 8, it is therefore rejected for the same reasons.

Regarding claims 25-27 and 29-30, they are method claims that correspond to the system of claims 10-12 and 14-15, thus they are rejected for the same reasons.



Regarding claim 31, it is a system claim that correspond to the method of claim 1 with the additional limitation that the query is received "from a client", Eden discloses a client server system (paragraphs 50-55), and the rest of the claim is rejected for the same reasons as the method in claim 1.

### ***Conclusion***

3. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Osborne, II et al. US 6,934,934 B1 discloses dynamically updating average response time values as the data is gathered (col. 23 ln. 47-55).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JASON RECEK whose telephone number is (571)270-1975. The examiner can normally be reached on Mon - Thurs 8:30am-5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Andrew Caldwell can be reached on (571) 272-3868. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Andrew Caldwell/  
Supervisory Patent Examiner, Art  
Unit 2442

/Jason Recek/  
Examiner, Art Unit 2442  
(571)-270-1975